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**UTAH LABOR COMMISSION**

**JOHN ROGERS,**

**Petitioner,**

**vs.**

**ASSOCIATED PIPELINE  
CONTRACTOR and  
LIBERTY MUTUAL,**

**Respondents.**

**ORDER AFFIRMING  
ALJ'S DECISION**

**Case No. 05-0766**

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Associated Pipeline Contractor and its insurance carrier, Liberty Mutual, (referred to jointly as "Pipeline") ask the Utah Labor Commission to review Administrative Law Judge La Jeunesse's award of benefits to John Rogers under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63G-4-301 and § 34A-2-801(3).

**BACKGROUND AND ISSUE PRESENTED**

Mr. Rogers claims workers' compensation benefits for a work accident that occurred on December 30, 2002, causing injury to his low back. Judge La Jeunesse held an evidentiary hearing and referred the medical aspects of the case to a medical panel. After reviewing the panel's report, Judge La Jeunesse awarded benefits, including a preliminary finding for permanent total disability benefits.

In its motion for review, Pipeline argues that Mr. Rogers is not eligible for permanent total disability benefits because (1) other work is reasonably available and (2) the work injury is not the direct cause of his disability.

**FINDINGS OF FACT**

The Commission adopts Judge La Jeunesse's findings of fact. The facts relevant to the motion for review are as follows:

Mr. Rogers had a history of preexisting back problems that left him with a 7.5% whole person impairment. On December 30, 2002, Mr. Rogers was attempting to change a bulldozer blade at work, when the blade arm swung out and hit him in the thighs, knocking him to the ground. This injury permanently aggravated his preexisting back condition, increasing his whole person impairment an additional 2.5%. His permanent restrictions include no lifting more than 15 to 20

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pounds, no repetitive frequent lifting over 10 pounds, frequent position changes, alternating sitting, standing, and walking every 30 minutes, and avoidance of repetitive or sustained bending, stooping, and twisting. He has been classified in the light duty work category.

Mr. Rogers has not returned to work since the work accident, despite his efforts. His wages at the time of the accident were \$11.92 an hour, which was also less than the state's average wage. Mr. Rogers' work background has been in the operation and maintenance of heavy construction equipment. At the time of his injury, he was 45 years old. He has a high school diploma and attended a two year apprenticeship program.

At the hearing, Pipeline's vocational expert identified several positions that he believed Mr. Rogers would be qualified to perform. However, most of these positions did not pay at least \$11.92 an hour, which was Mr. Rogers' rate of pay at the time of the accident. The only positions identified that would have paid him at least what he was previously making were in telemarketing. However, all of those positions required typing on a keyboard, and the results of Mr. Rogers' functional capacity evaluation scored him at the bottom 1% of the population for dexterity—thus Judge La Jeunesse found that he was not qualified to perform those jobs.

**DISCUSSION AND CONCLUSION OF LAW**

In order to be entitled to permanent total disability benefits, § 34A-2-413 of the Utah Workers Compensation Act requires Mr. Rogers to show that (1) he is significantly impaired as a result of the work accident; (2) he is permanently and totally disabled [as determined by another four-part test found in § 34A-2-413(c)]; and (3) the work accident was the direct cause of his disability. In its motion for review, Pipeline argues that the last two elements were not shown and therefore Mr. Rogers was not entitled to permanent total disability benefits.

The Commission first turns to Pipeline's argument that Mr. Jones has not shown he is permanently and totally disabled. To establish this element, § 34A-2-413(1)(c)(iv) requires Mr. Rogers to show that he cannot perform other work reasonably available taking into consideration his age, education, **past work experience**, medical capacity, and residual functional capacity. The Commission has promulgated Rule R612-1-10(D) to further define what may constitute "other work reasonably available," particularly in consideration of the claimant's past work experience. That rule provides that other work is reasonably available if the work provides a gross income at least equivalent to:

- (1) The current state average weekly wage, if at the time of the accident the claimant was earning more than the state average weekly wage then in effect; or
- (2) The wage the claimant was earning at the time of the accident, if the employee was earning less than the state average weekly wage then in effect.

Pipeline contends that when the Commission promulgated Rule R612-1-10(D), it was acting

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in excess of its statutory authority and therefore Judge La Jeunesse's decision applying this rule should be overturned. However, the Utah Court of Appeals has previously resolved this question in LPI Services v. Labor Commission, 173 P.3d 858 (Utah Ct. App. 2007). In that decision, the court affirmed the Commission's conclusion that the income test set forth in R612-1-10(D) is consistent with the statutory provisions of § 34A-2-413(1)(c)(iv) and that the Commission did not abuse its authority in promulgating the rule. Therefore, Judge La Jeunesse's application of this rule was appropriate. According to the rule, none of the jobs Pipeline identified provided at least \$11.92 an hour (what he had been making at the time of his injury) and, therefore, those jobs do not represent other jobs reasonably available to Mr. Rogers. The Commission has reviewed the record and concurs with Judge La Jeunesse's finding that, taking into account Mr. Jones' age, education, past work experience, medical capacity, and residual functional capacity, he could not perform other jobs reasonably available and he is permanently and totally disabled.

Pipeline's second argument is that the work accident was not the direct cause of Mr. Rogers' disability. Pipeline contends that Mr. Rogers was unable to perform some of the jobs identified because of his lack of dexterity for typing, not due to his back condition, and thus the work injury is not the direct cause of his inability to work. However, there is no evidence that shows Mr. Rogers was ever qualified to perform those typing jobs, even prior to the work injury, and his inability to perform those same jobs after the injury is not indicative of whether his work injury is the direct cause of his disability. More persuasive is the fact that prior to the December 30, 2002, work injury, Mr. Rogers was qualified to work and had been working; it was only after his work injury that he was no longer able to return to work due to his disability. Therefore the Commission concurs with Judge La Jeunesse's finding that the work injury was the direct cause of Mr. Rogers' disability and affirms the preliminary award for permanent total disability benefits. The Commission does note that Judge La Jeunesse's preliminary order for benefits awarded Mr. Rogers \$461 per week in compensation based on an incorrect calculation of Mr. Rogers' average weekly wage. Mr. Rogers' previous average weekly wage was \$476.80 (\$11.92 x 40 hours) and thus his permanent total disability compensation rate should be \$318.00 per week (\$476.80 x 66.67%).

**ORDER**

The Commission affirms Judge La Jeunesse's decision with modification to the amount of Mr. Winn's weekly permanent total compensation award to \$318, and remands this matter to Judge La Jeunesse for further proceedings as necessary to conclude the adjudication of Mr. Winn's claim for permanent total disability benefits. It is so ordered.

Dated this 26<sup>th</sup> day of November, 2008.

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Sherrie Hayashi  
Utah Labor Commissioner

**IMPORTANT! NOTICE OF APPEAL RIGHTS FOLLOWS ON NEXT PAGE.**

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**NOTICE OF APPEAL RIGHTS**

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.